IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,	)	CIVIL DIVISION
	)	No.: 00-CV-2041
Plaintiff,	)	
v.	)	JUDGE WILLIAM L. STANDISH
PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES VON BERNUTH, JOHN HERKLOTZ, an individual,	)	
Defendants.	)	

REPLY BRIEF TO PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. §1404(a)

AND NOW, comes Defendant, John Herklotz, (hereinafter "Herklotz"), by and through his attorneys, Burns, White & Hickton, LLC, and John P. Sieminski, Esquire, and files the within Reply Brief To Plaintiff's Brief in Opposition to Motion to Transfer Venue Pursuant to 28 U.S.C. §1404(a).

I. ARGUMENT

On October 13, 2006, Plaintiff filed its Response to Herklotz's Motion to Transfer Venue Pursuant to 28 U.S.C. §1404(a). Plaintiff's Response included a section styled as a "Motion to Dismiss" the Motion to Transfer Venue. In its supporting Brief in Opposition, Plaintiff primarily argues that to satisfy the burden of establishing factors supporting the request for transfer based upon convenience of the witnesses, a movant "must submit Affidavits of the proposed witnesses attesting to the substance of their testimony and their unwillingness to attend trial." (See Plaintiff's Brief in Opposition, pp. 2-3). Plaintiffcites *Plum Tree, Inc. v. Stockment*, 488 F.2d 754 (3d Cir. 1973); *Labrot v. John Elway Chrysler Jeep*, 436 F.Supp. 2d 729 (E.D. Pa. 2006); and *Figgie International, Inc. v. Destileria Serralles, Inc.*, 925 F.Supp. 411 (D.C. SC 1996), *discussed infra*, to support its argument. However, the Courts in the Third Circuit do not mandate the submission of affidavits to support a Motion to Transfer pursuant to Section 1404(a).

In *Plum Tree*, the Plaintiff sought a writ of mandamus or prohibition directing that the District Court vacate its Order transferring an action pursuant to 28 U.S.C. §1404(a) to the Southern District Court of Texas. The motion to transfer was devoid of any supporting documentation establishing the necessary elements for the transfer, and the District Court did not conduct a hearing or conference before the District Court decided the motion.[1] The Court of Appeals for the Third Circuit suggested that affidavits could be submitted along with other documents including briefs, depositions, stipulations, a list of names and addresses of witnesses whom the moving party intends to call, witness statements, or other documents, or make oral argument to demonstrate the necessary elements for transfer. *Plum Tree*, 488 F.2d 754, 757-758. Ultimately, the Third Circuit held that in the event that the District Court did not vacate its

[1] The Third Circuit Court addressed the District Court's failure to state the factors it considered in its Order granting the motion to transfer. The Court stated that when the evidence and arguments supporting a transfer were in doubt, a hearing or conference would have been desirable before deciding the motion. 488 F.2d 754, 756.

Order transferring the action, a writ of mandamus wouldissue, directing the respondent judge to vacate and set aside the Order without prejudice to the right of the defendants on remand to renew theirm otion for transfer supported by appropriate documents in accordance wih the Third Circuit's opinion. 488 F.2d at 758.

In *Labrot*, the United States District Court for the Eastern District of Pennsylvania analyzed a defendant's motion to transferv enue to the District Court of Colorado. The Court denied the defendant's motion. The Court considered the availability of compulsory service as a factor in determining whether to transfer venue pursuant to Section 1404(a). In doing so, the Court noted that neither party had submitted a witness list or any evidence supporting the materiality of the proposed witnesses' testimony or the unwillingness of these proposed witnesses to testify in the distant forum and, therefore, the Court could not accurately gauge which party would suffer more from the loss of compulsory process. *Labrot*, 436 F.Supp. 2d 729, 731, fn. 3. The Court did not hold that the submission of an affidavit was mandatory. The Court held that a moving party must support itsm otion to transfer with the various documents set forth in *Plum Tree*. *Id.*

In *Figgie International*, the District Court of South Carolina held that the court could not transfer venue for convenience of the parties or witnesses pursuant to Section 1404(a) without affidavits from the witnesses and/or parties involved detailing to the court why or to what extent he or she would be inconvenienced by moving the case to another district or allowing the case to remain in the district where it was brought. 925 F.Supp. 411, 414. However, the South Carolina District Court's holding is neither precedential nor binding on this Court. Further, the South Carolina District Court's holding does not restrict this Court from exercising its broad discretion when ruling on a motion to transfer as guided by the individual case-specific factors relative to this case.

In this case, Herklotz sufficiently sets forth reasons in his Motion to Transfer and Supporting Brief to satisfy the necessary elements to transfer this case to the Central District of California. Stated briefly, Herklotz asserts that transfer of venue is appropriate in this matter due to his declining health, the location of several key witnesses, and the convenience of the parties.[2] Further, Herklotz states that he intends to call several witnesses during the trial of this matter and explains in detail the reasons why those witnesses would not attend a trial when it is scheduled. (*See* Herklotz's Brief in Support, p. 8).

In addition, because Defendants, Parkinson, Von Bernuth and Plaza are adverse parties who have done nothing whatsoever in the last 2 years that this matter has been pending to defend their interests, Herklotz submits that it would be equally unrealistic to believe that Herklotz could obtain affidavits or other documentation of the substance of their testimony or demonstrate further their unwillingness to attend trial in Pittsburgh. Defaults have been entered against Parkinson, Von Bernuth, and Plaza. These defaults were entered by the Court only after notice and orders to show cause why the defaults should not be entered. Therefore, it is illogical to assume, even if this Court ordered them to do

[2] Herklotz's Motion to Transfer attaches a copy of a letter from his physician limiting Herklotz's ability to travel due to his physical condition.

so, that Charles Von Bernuth and Eric Parkinson would purchase airline tickets, make hotel reservations, and come to Pittsburgh for a trial.

Mr. Herklotz has cross-claims against Von Bernuth and Parkinson. In addition, Mr. Herklotz should have the opportunity to cross-examine Von Bernuth and Parkinson on issues that pertain to WRS's damages. Therefore, the trial of this matter must be held in a Court that has the ability to compel the physical presence of Mr. Von Bernuth and Mr. Parkinson, both individually, and as representatives of Plaza, against which Mr. Herklotz also has a cross-claim.

II. CONCLUSION

Based upon this Court's broad discretion to grant a Motion to Transfer, pursuant to 28 U.S.C. §1404(a) and the balancing of the factors set forth at length in Herklotz's Motion to Transfer and Supporting Brief, this case should be properly transferred to the Central District of California. Therefore, Defendant, John Herklotz, respectfully requests this Honorable Court to grant Defendant's Motion to Transfer Venue Pursuant to 28 U.S.C. §1404(a) to the more appropriate Central District of California.

Respectfully submitted,

By: /s/ John P. Sieminski

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